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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RONALD CHARLES ROSSER,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

No. B186824

(Super. Ct. No. TA079489)

ORIGINAL proceedings in mandate. Jack W. Morgan, Judge. Writ granted.

Michael P. Judge, Public Defender, Cedric L. Payne and John Hamilton Scott, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Steve Cooley, District Attorney, Lael Rubin, Head Deputy District Attorney, Patrick D. Moran and Shirley S. N. Sun, Deputy District Attorneys, for Real Party in Interest.

Defendant Charles Rosser petitions for a writ of prohibition or mandate directing the trial court to vacate its order denying his motion under Penal Code section 1382 to dismiss the information against him and to enter a new order granting the motion.<sup>1</sup> We grant the petition.

## **BACKGROUND**

All relevant events took place in the year 2005. An information filed on July 6 accused Rosser of various crimes related to an alleged carjacking. Rosser alleges he was arraigned on July 6; the People allege the arraignment was on July 7. Regardless, there is no dispute that because of the Labor Day holiday, the date set for trial, September 6 (a Tuesday), was the last court day of the initial 60-day period under section 1382.

On August 31 (six days before the trial date), the People filed a motion for a continuance, on the ground that the deputy district attorney assigned to prosecute the case was scheduled to begin an attempted murder trial in another case on the same date that Rosser's trial was scheduled to begin. Citing *Batey v. Superior Court* (1977) 71 Cal.App.3d 952 (*Batey*), the People argued that in conjunction with a codefendant's illness, "[a]ssignment of the prosecutor to another trial has been held to constitute good cause for a short delay" of a trial. The People also noted that, under Penal Code section 1050, subdivision (g), good cause exists in cases involving murder, certain sexual abuse or sexual assault crimes, or domestic violence, when the prosecutor assigned to one of those cases has another trial,

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<sup>1</sup>

Further undesignated statutory references are to the Penal Code.

preliminary hearing, or motion to suppress in progress.<sup>2</sup> In the motion, the People did not assert that there was an ill codefendant as in *Batey*, or that the case involves one of the crimes described in section 1050, subdivision (g). Instead, the People explained that the assigned deputy conducted the preliminary hearing and was intimately familiar with the witnesses and issues in this case. The People requested that trial of the present case be continued for a short period, to a date immediately following the completion of the other trial the deputy was prosecuting.

On September 6, the hearing on the motion to continue was held in Department J of the South Central District. A different deputy district attorney appeared for the assigned deputy. After stating its understanding that the assigned deputy had in fact started trial in another case that morning which was expected to last approximately a week, the court asked defense counsel to respond to the motion. Defense counsel stated, “I am just going to object for the record. I don’t believe it establishes good cause why the case couldn’t be tried by someone else. I submit that to the court.” Without any further discussion, the court found there was good cause for a continuance. The court suggested September 15 as the date for trial, and asked defense counsel if that date would work. Counsel told the court that he had three other trials set for that week, but was not sure if any of them

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<sup>2</sup> Section 1050, subdivision (g) provides in relevant part: “For purposes of this section, ‘good cause’ includes, but is not limited to, those cases involving murder, as defined in subdivision (a) of Section 187, allegations that stalking, as defined in Section 646.9, a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or Section 1165.6, or domestic violence as defined in Section 13700, or a case being handled in the Career Criminal Prosecution Program pursuant to Sections 999b through 999h, or a hate crime, as defined in Title 11.6 (commencing with Section 422.6) of Part 1, has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court.” (§ 1050, subd. (g)(2).)

would actually start. He suggested that the court set the trial on September 15, and they would “see what happens.”

On the continued trial date of September 15, Rosser filed a motion to dismiss on the ground that his rights to due process and a speedy trial were violated.<sup>3</sup> Rosser argued that, under section 1382, the court is required to dismiss a felony case when the defendant has not been brought to trial within 60 days after arraignment, unless there is a showing of good cause for the delay. Defense counsel’s declaration stated that there had been no explanation at the hearing on the motion for a continuance as to why a deputy other than the assigned deputy could not try this case.

The case was assigned to Division 10 of the South Central District for a hearing on the motion to dismiss. The judge in Division 10 denied the motion on the ground that he did not have the power to reconsider the earlier finding of the judge in Department J that there was good cause to grant the continuance. That same afternoon, at defense counsel’s request, the case was transferred back to Department J to allow the judge in that department to rule on the merits of the motion to dismiss. The judge in Department J denied the motion on the ground that there had been good cause to continue the trial on September 6. Late that same afternoon, the case was transferred back to Division 10 for trial. At 4:20 p.m. that afternoon, a jury panel was sworn, admonished, and ordered to return the following morning.

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<sup>3</sup> The exhibits filed with Rosser’s petition contain two copies of his motion to dismiss. A file-stamped copy is included with Exhibit B, and it includes the notice of motion, a declaration of the deputy public defender representing Rosser, and points and authorities. An incomplete copy of the motion, without a file stamp and with marginalia, is included with Exhibit D; it does not include the points and authorities.

Before voir dire commenced the next morning, defense counsel asked the judge in Division 10 to discharge the jury panel and grant a continuance to allow his office time to file a writ petition. With no objection by the prosecutor, the court granted counsel's request. The petition for writ of prohibition/mandate was filed 42 days later. We issued a temporary stay and requested a preliminary opposition to the petition from the People. Upon consideration of the preliminary opposition and Rosser's reply, we issued an alternative writ of mandate, directing the superior court to vacate the order denying Rosser's motion to dismiss and enter a new order granting that motion or, in the alternative, to show cause why a peremptory writ of mandate should not issue. The People filed a return to our order.

## **DISCUSSION**

The right to a speedy trial is a fundamental right guaranteed by the federal and state Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776 (*Rhinehart*); see also § 686, subd. (1).) The Legislature enacted section 1382 to implement an accused's right to a speedy trial. (*Rhinehart, supra*, 35 Cal.3d at p. 776.) That section provides that, unless good cause is shown, a felony prosecution must be dismissed if the defendant is not brought to trial within 60 days of the defendant's arraignment.

There is no dispute that Rosser was not brought to trial within 60 days of his arraignment. Rosser contends that the superior court abused its discretion by denying his motion to dismiss because there was no good cause shown for the delay in prosecution. In the return to Rosser's petition, the People do not meaningfully challenge Rosser's contention. Although the return states in passing

that there was good cause for the delay (with no attempt to explain), the People argue that the writ should be denied on procedural grounds. We disagree.

A. *Good Cause*

In denying Rosser's motion to dismiss, the superior court (Department J) found there had been good cause to continue the trial on September 6. In the motion to continue, the only ground asserted was the unavailability of the assigned prosecutor. It is unclear, however, on what legal basis the People relied to argue the prosecutor's unavailability constituted good cause.

As noted above, the People's motion for a continuance made passing reference to section 1050, subdivision (g), and *Batey, supra*, 71 Cal.App.3d 952. But neither in the motion nor at the hearing on the motion did the People attempt to show how section 1050, subdivision (g) or *Batey* applied to this case.

Nonetheless, at the later hearing on Rosser's motion to dismiss, the People argued that under section 1050, subdivision (g), good cause exists in any case when the specially-assigned prosecutor is engaged *in another trial* that involves one of the enumerated crimes. According to this theory, because the assigned deputy was engaged in another trial that involved attempted murder, a crime listed in section 1050, subdivision (g), good cause for the continuance of Rosser's case existed.

However, in the return filed in response to our alternative writ, the People argue that the motion for the continuance was *not* made under section 1050, subdivision (g). They also concede that the interpretation of the statute asserted by the prosecutor at the hearing on Rosser's motion to dismiss is incorrect.<sup>4</sup>

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<sup>4</sup> As the language and legislative history of section 1050 make clear, a prosecutor's engagement in another trial provides good cause for a continuance under subdivision (g)

Despite their current position, the People apparently do not concede that the continuance of Rosser's case was unsupported by good cause. The only other possible ground for good cause was the assigned prosecutor's unavailability, considered in light of the asserted complexity of Rosser's case, the assigned prosecutor's familiarity with the issues and witnesses, and the potential delay of only a few days. In the motion for a continuance, the People cited *Batey, supra*, 71 Cal.App.3d 952, noting that the appellate court in that case found that the trial court did not abuse its discretion by granting a short continuance based in part upon the assigned prosecutor's unavailability due to an extended trial in another case. *Batey* is inapplicable. There, the prosecutor supported his motion with a declaration that no other deputy district attorney was familiar with facts of the case. (*Batey, supra*, 71 Cal.App.3d at p. 954.) Here, there was no such declaration. Indeed, as the assigned prosecutor stated at the hearing on the motion to dismiss and as the People allege in the return, another prosecutor *was* available. The People simply failed to demonstrate good cause for a continuance.

B. *Procedural Issues*

Despite the absence of good cause for the continuance of the trial, the People contend that Rosser should be denied writ relief because he failed to exercise due diligence and because he waived his speedy trial claim. We are not persuaded.

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of section 1050 only when *the continued case* involves one of the enumerated crimes. The instant case does not involve one of the enumerated crimes. Therefore, section 1050, subdivision (g) does not apply in this case.

1. *Due Diligence*

The People argue that Rosser failed to exercise due diligence in three instances: (1) Rosser did not file the motion to dismiss until the day set for trial; (2) Rosser failed to litigate his motion to dismiss before the jury panel was sworn; and (3) Rosser filed his writ petition 42 days after the trial had commenced. None of these instances shows a lack of due diligence that would preclude writ relief.

The People's motion for a continuance was granted on September 6 and the trial was continued nine days, to September 15. Rosser's motion to dismiss was filed (and denied) on September 15. The People argue that Rosser's "long" nine-day delay in filing his motion shows a lack of due diligence. But the only time requirement the Supreme Court has identified for bringing a motion to dismiss under section 1382 is that the motion must be brought after the expiration of the time allowed to bring the defendant to trial, but before the beginning of the trial. (*People v. Wilson* (1963) 60 Cal.2d 139, 147 (*Wilson*).) The People point to no case in which a delay of slightly more than one week in bringing a motion to dismiss was held to show a lack of due diligence when the motion was filed before trial commenced.

The People also argue that, under *Wilson, supra*, 60 Cal.2d 139, Rosser was required to file and litigate his motion to dismiss before the commencement of trial, and he failed to do so because the jury panel was sworn in Division 10 before the judge in Department J denied the motion. The People misread the record. The minute orders show that Rosser's motion to dismiss was originally argued before the judge in Division 10, beginning in the morning session on September 15. At 2:20 p.m. that same day, the case was sent to Department J for a hearing on the motion to dismiss. The judge in Department J denied the motion and transferred the case back to Division 10 for trial. At 4:20 p.m., the jury panel was sworn in



Division 10, and ordered to return the following morning.<sup>5</sup> On September 16, the judge in Division 10 granted Rosser's request for a continuance to allow him to file a writ petition and discharged the jury. Thus, the record shows that Rosser filed and litigated his motion to dismiss before the jury panel was sworn.

Finally, once again relying upon *Wilson, supra*, 60 Cal.2d 139, the People contend that a defendant must petition for a writ of mandate before the commencement of the trial (*id.* at p. 149), and that Rosser failed to satisfy this requirement because he did not file his writ petition until 42 days after the jury panel was sworn. The People argue that, under *Rhinehart, supra*, 35 Cal.3d 772, a trial is commenced when the case has been called for trial by a judge who is available and ready to try the case to conclusion (*id.* at p. 780), and therefore the trial in this case had commenced, by the swearing of the jury panel, before Rosser asked for a continuance so he could file a writ petition.

While it is correct that the Supreme Court stated in *Wilson* that "the defendant's *proper remedy* in this situation is to petition for writ of mandate prior to the commencement of trial" (*Wilson, supra*, 60 Cal.2d at p. 149), neither *Wilson* itself nor any of the cases the Supreme Court cited in support of that statement actually presented the question of when a writ petition challenging the denial of a motion to dismiss must be filed. Indeed, none of the cases the Supreme Court cited addressed the timing of the petition at all; instead, each involved the availability of a peremptory writ of mandate as a remedy. And in *Wilson*, the issue was not whether the defendant filed a timely petition -- in fact, the defendant *had* filed a timely petition, which was denied by the court of appeal, but failed to petition the

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<sup>5</sup> Although the minute orders clearly show the sequence of events, the reporter's transcript is misleading because there is no indication in the transcript that the case was transferred to Department J and then back to Division 10 before the jury was called in; the transcript merely states "(Pause in proceedings.)"

Supreme Court for a hearing after that denial. Rather, the issue was whether the defendant was entitled to reversal of a conviction *after trial* if he did not demonstrate that he was prejudiced by the delay in the start of his trial.

In the present case, a panel of prospective jurors was sworn at the end of the day immediately after Rosser's motion to dismiss was denied, but the jurors were discharged the following morning before voir dire took place and the matter was continued to allow Rosser to file a petition with this court. The petition was filed less than a week after the reporter's transcript of the proceedings in Division 10 was certified. There was no undue delay by Rosser in seeking a continuance of the trial and petitioning this court for writ relief.

## 2. *Waiver*

The People contend that Rosser waived his objection to the continuance of the trial by (1) failing to be more specific in his objection at the hearing on the motion for a continuance; (2) failing to object to the setting of the trial date after the motion for a continuance was granted; and (3) failing to state his readiness for trial when the motion for a continuance was argued. These contentions are meritless.

The People argue that Rosser has forfeited the right to raise the absence of good cause under section 1050, subdivision (g). The reason: he did not specifically object to section 1050, subdivision (g), as the basis for the continuance. The argument ignores the burden placed upon the party seeking to continue a trial. Section 1050 makes clear that a continuance may be granted "only upon a showing of good cause." (§ 1050, subd. (e).) Thus, it was the People's burden to show good cause under section 1050, subdivision (g), if it existed. Rosser's objection that good cause was absent preserves the issue for review, even

in the absence of a specific objection that section 1050, subdivision (g) did not apply.

The People also assert that Rosser impliedly consented to a delay in the trial because, although he objected to the continuance before it was granted, he did not make an immediate second objection when the court set a new date. To state the contention is to answer it. The court had already granted the continuance over Rosser's objection. A second objection to the specific date chosen would have served no purpose other than unnecessary obstruction to the proceeding.

Finally, relying upon *Townsend v. Superior Court* (1975) 15 Cal.3d 774, the People argue that Rosser waived his objection to the continuance because his counsel did not state his readiness for trial. *Townsend* is inapposite. In *Townsend*, the Supreme Court considered the 10-day grace period of section 1382. Defendant had consented to a trial date more than 60 days after arraignment. On the continued trial date, defense counsel stated he was ready for trial, but was in fact unavailable due to a conflicting trial. (*Id.* at pp. 778-779.) The Supreme Court held that the 10-day grace period did not commence until defense counsel was both ready *and* available to try the case. Thus, *Townsend* deals with the commencement of the 10-day grace period after the defense has already consented to a continuance beyond the initial 60-day period. It has nothing to do with the consequences of setting a trial beyond the initial 60-day period over the defendant's express objection. It certainly does not suggest that the defendant need do anything more than object to invoke the protection of the initial 60-day deadline in the trial court.

## **DISPOSITION**

Let a writ of mandate issue directing respondent court to vacate its order denying Rosser's motion to dismiss, and to enter a new and different order granting the motion.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

HASTINGS, J.\*

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\*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.